No. 48787-0-II

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**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

DEENA M. SANDBERG, APPELLANT

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Appeal from the Superior Court of Mason County
The Honorable Toni. A. Sheldon, Judge

No. 14-1-00336-6

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# BRIEF OF RESPONDENT

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## A. INTRODUCTION

The appellant, Deena Sandberg, pled guilty in the trial court to one count of assault in third degree for causing injury to a police officer by digging her fingernails into officer's arm while the officer was performing official duties. Before sentencing, Sandberg moved to withdraw her guilty plea. The trial court denied Sandberg's motion. Sandberg now appeals the trial court's denial of her motion to withdraw her guilty plea.

The circumstances surrounding Sandberg's guilty plea approach, but do not quite reach, several issues that might otherwise undermine the validity of her guilty plea. For example, Sandberg apparently suffers from a seizure disorder, and at the hearing to enter her guilty plea, Sandberg protested that the assault was an accident that occurred because she was having a seizure and that she did not purposefully injure the officer. Thus, Sandberg's guilty plea was initially somewhat equivocal, but despite the equivocation, the trial court took no action to erase the ambiguity before accepting her guilty plea.

Additionally, after the court accepted Sandberg's guilty plea and Sandberg had indicated her intent to withdraw her guilty plea, but before sentencing, the court signed an order referring Sandberg for a competency



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evaluation. However, after receiving the competency report some months later, the court found Sandberg competent and sentenced her.

Also, despite Sandberg's initial protestation that she injured the officer accidentally, she nevertheless admitted that she assaulted the officer, and she pled guilty. In exchange for her plea of guilty, the prosecutor made a lenient sentencing recommendation, to include a first-time offender waiver, and Sandberg's attorney informed the court that one of Sandberg's incentives for pleading guilty was to avoid a holdback charge of bail jumping. Thus, Sandberg's guilty plea had characteristics of an *Alford-Newton* plea, except that Sandberg did not specifically acknowledge that she was aware that intent is an inherent element of assault; nor did she specifically state that even though she was denying the intent element of the offense, she was nevertheless voluntarily choosing to plead guilty in order to accept the benefits of the guilty plea.

Another peculiarity about the guilty plea is that the CrR 4.2(d) factual basis for the plea was Sandberg's statement of defendant on plea of guilty, where Sandberg admitted that she assaulted a law enforcement officer who was performing official duties, but she did not specify that her conduct was intentional. The court had in its possession the probable cause statement, from which court could have inferred intent, but the court



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did not reference the probable cause statement during the hearing to accept Sandberg's guilty plea and did not specifically incorporate it into the record of the hearing.

Sandberg contends that her guilty plea was invalid because, she avers, she did not understand that intent was a necessary element of the crime to which she pled guilty, assault in the third degree. The State contends that despite the peculiarities summarized above, the trial court did not abuse its discretion when it denied Sandberg's motion to withdraw her guilty plea. The State contends that the trial court's discretion was sound in this case because the totality of the circumstances shows that Sandberg clearly understood the intent element of assault, but she nevertheless voluntarily, knowingly, and intelligently pled guilty, and she has failed to show that withdrawal of her plea is necessary to correct a manifest injustice.

Additionally, Sandberg avers that her guilty plea was invalid because she was misinformed of one direct and one collateral consequence of her plea, but as the State argues below, Sandberg's averments on this point are in the first instance contradicted by controlling precedent, and in the second instance is unsupported by the record.



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B. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. Sandberg contends that the trial court erred by accepting her guilty plea to the charged crime of assault in the third degree, because, she avers, she did not understand that intent is an element of the crime of assault. The State contends that Sandberg's appeal on this point should be denied, because the totality of the record shows that Sandberg did understand that intent is an element of assault and that, despite her protestation that the assault was an accident, she nevertheless voluntarily, knowingly, and intelligently chose to plead guilty as charged; thus, she has not shown a manifest injustice, and the trial court did not abuse its discretion by denying Sandberg's motion to withdraw her guilty plea.

2. Sandberg contends that the court misinformed her of a direct consequence of her guilty plea because the court informed her of both the standard range sentence and the maximum sentence even though, she contends, only the standard range sentence was a real possibility in this case. Sandberg's contention on this point is directly contradicted by controlling precedent of this Court, and the State asks that this Court adhere to its established precedent.

3. Sandberg contends that the trial court misinformed her of a collateral consequence of her guilty plea because, she avers, she was affirmatively advised that if the court accepted the prosecutor's recommendation of a first-time offender waiver, her felony conviction for assault in the third degree would not appear on her criminal history. The State contends that Sandberg's claim on this point should be rejected because she has not provided any citation to the record to substantiate her claim.



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C. FACTS AND STATEMENT OF THE CASE

Because this case arises out of Sandberg's plea of guilty and resulting waiver of trial in the trial court, the facts available are primarily those contained in the probable cause statement and the guilty plea hearing, as follows:

On August 1, 2014, the defendant-appellant, Deena Sandberg, was attending an event at the Little Creek Casino in Mason County, Washington. CP 76. Apparently, Sandberg and her husband had tickets for reserved seats at the event. *Id.* Sandberg went to their seats while her husband went to get refreshments. *Id.* When Sandberg arrived at their seats, she found them occupied by two other people. *Id.*

Sandberg tried to have a casino employee remove the strangers from her seats, but was unsuccessful. *Id.* She then sat down in a different seat. *Id.* She "then stood up and hit one of two people that w[ere] sitting in her seats." *Id.*

Casino employees asked Sandberg to leave the premises, but she refused. *Id.* A tribal police officer, Officer Klusman, arrived and attempted to escort Sandberg from the premises, but Sandberg refused to leave. *Id.* Officer Klusman then physically escorted Sandberg from the building. *Id.* While Officer Klusman escorted Sandberg from the



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premises, Sandberg cursed and screamed at other patrons and at Officer Klusman. *Id.*

Once they got outside, Sandberg was screaming and kicking, and she dug her fingernails into Officer Klusman's arm, drawing blood. *Id.* Another officer then arrived and assisted with gaining control of Sandberg and placing her in handcuffs. *Id.* Medics were called to examine both Sandberg and Officer Klusman. *Id.* Sandberg had no injuries; so, Mason County Sheriff's Deputy Corporal Reed transported her to the Mason County jail. *Id.*

When Corporal Reed arrived with Sandberg at the jail, Corporal Filyaw of the Mason County jail came out to meet Corporal Reed and assist him with Sandberg. CP 78. While Corporal Filyaw was escorting Sandberg to the pat-down area, Sandberg began to resist and tried to scratch Corporal Filyaw's fingers and hand. *Id.* Another officer, Officer Reeves, then assisted by taking an escort position on Sandberg's right side. *Id.* Sandberg became more resistive and resumed trying to scratch Corporal Filyaw's fingers and hand. *Id.* Corporal Filyaw regained control by using a modified hold, and with Officer Reeve's assistance, brought Sandberg into the pat-down area. *Id.*



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In the pat-down area, Sandberg refused to obey commands and refused to face the wall for the pat-down search, as directed. *Id.* During the pat-down search, Sandberg continued to try to scratch Corporal Filyaw's fingers and tried to kick Officer Reeves. *Id.* After the pat-down search, officers carried Sandberg to a holding cell. *Id.* During the trip to the cell, Sandberg "scratched [Corporal Filyaw's] right arm with her long [fingernails] and broke the skin." *Id.*

Based on Sandberg's assault of Officer Klusman, the State charged Sandberg with one count of third degree assault. CP 73. Sandberg entered a plea of guilty to the charge. CP 63-72; RP 13-20. When entering her plea of guilty, Sandberg protested that the assault was an accident. RP 14. The court interrupted Sandberg and explained the plea process to her. RP 14-18. The court did not further inquire about Sandberg's claims that the assault was an accident. RP 13-20.

The charging information specifically alleged that Sandberg "did intentionally assault" Klusman. CP 73. In her written statement of defendant on plea of guilty, Sandberg admitted that she assaulted Officer Klusman, but she did not specify that the assault was intentional. CP 70; RP 18. Sandberg's attorney informed the court that "there was holdback charges of bail jumping that the State would have filed had the case gone



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to trial, and that was part of [Sandberg's] consideration." RP 19. The court accepted Sandberg's guilty plea. RP 19. After the court accepted Sandberg's guilty plea, the sentencing was set over for about five weeks. RP 19-20.

When Sandberg appeared for sentencing, she again told the court that the assault was an accident. RP 24. The court suggested that Sandberg take a minute with her attorney to discuss filing a motion to withdraw her guilty plea. RP 24. After consultation with Sandberg, Sandberg's attorney then informed the court that Sandberg would be filing a motion to withdraw her plea. RP 25. The court continued the sentencing to allow time for Sandberg to file her motion. RP 26. The court then appointed a new attorney to represent Sandberg. RP 26-27.

At the next hearing, Sandberg's new attorney appeared and informed the court that he had not filed a motion and that he did not see a basis for the motion. RP 27. Sandberg's new attorney asked to set the matter over for a couple of more weeks so he could talk to her. RP 29. The court granted the request. RP 31.

At the next hearing, Sandberg's new attorney asked that Sandberg undergo a competency evaluation. RP 31-33. The trial court judge granted the request. RP 33. About five months later, Sandberg was back



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in court, with yet another new attorney, for review of the competency evaluation and to receive the court's findings regarding competency. RP 34-37. The case was continued an additional week because Sandberg's attorney had not yet seen the competency report. *Id.*

When the hearing resumed the next week, Sandberg was not present, because she had suffered a seizure and had left the courtroom on a gurney before the court called the case. RP 38-39. The court continued the case for one additional week. RP 39. Sandberg did not appear at the next hearing, so the court set the hearing over for one additional week. RP 40. At Sandberg's next appearance, the court reviewed the competency report, found Sandberg to be competent, and set the matter out about a month for the sentencing hearing. RP 43.

At the next hearing, which was to be the sentencing hearing, Sandberg's original attorney appeared in the place of her most recent attorney and informed the court that Sandberg's attorney was "still pursuing a motion to withdraw her guilty plea." RP 44. The court continued the hearing one week. RP 47.

Sandberg and her attorney appeared at the next hearing, and Sandberg's attorney filed a motion to withdraw her plea of guilty and filed a supplemental statement of facts. RP 47. But neither the court nor the

parties were prepared to go forward with the motion; so, the court set the matter over a couple of more weeks. RP 49.

The court eventually heard the motion. RP 55-69. But after hearing the motion, the court denied it. RP 69. About three weeks later, the court held the sentencing hearing and entered the judgment and sentence. RP 71-80; CP 6-19.

Sandberg now appeals the trial court's denial of her motion to withdraw her guilty plea. CP 4-5.

## D. ARGUMENT

1. Sandberg contends that the trial court erred by accepting her guilty plea to the charged crime of assault in the third degree, because, she avers, she did not understand that intent is an element of the crime of assault. The State contends that Sandberg's appeal on this point should be denied, because the totality of the record shows that Sandberg did understand that intent is an element of assault and that, despite her protestation that the assault was an accident, she nevertheless voluntarily, knowingly, and intelligently chose to plead guilty as charged; thus, she has not shown a manifest injustice, and the trial court did not abuse its discretion by denying Sandberg's motion to withdraw her guilty plea.

Sandberg contends that, because "the record did not demonstrate she understood the elements of third degree assault[,]" the trial court erred by denying her motion to withdraw her guilty plea. Br. of Appellant at 1. A trial court's decision denying a motion to withdraw a guilty plea is


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reviewed for an abuse of discretion. *State v. Robinson*, 172 Wn.2d 783, 791, 263 P.3d 1233 (2011).

"Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily." *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996), citing *State v. Barton,* 93 Wn.2d 301, 304, 609 P.2d 1353 (1980) (citing *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). "Beyond this constitutional minimum" (*Ross* at 284), a Washington court rule, CrR 4.2(f), requires that "[t]he court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice."

The constitutional due process "standard is reflected in CrR 4.2(d), which mandates that the trial court 'shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.'" *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). In turn, CrR 4.2(f) requires that "once a guilty plea is accepted, the court must allow withdrawal of the plea only 'to correct a manifest injustice.'" *Mendoza* at 587, quoting CrR 4.2(f).

Although CrR 4.2(f) addresses only manifest injustice and does not mention the validity of a plea, courts have held that "[a] defendant may withdraw a guilty plea if it was invalidly entered *or* if its enforcement would result in a manifest injustice." *State v. Kennar*, 135 Wn. App. 68, 73, 143 P.3d 326 (2006) (emphasis added), citing *In re Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004); CrR 4.2(f). "The State has the burden of proving validity of the guilty plea under a totality of the circumstances test." *In re Pers. Restraint Petition of Mayer*, 128 Wn. App. 694, 703, 117 P.3d 353 (2005), citing *State v. Ross,* 129 Wn.2d 279, 287, 916 P.2d 405 (1996). "But the defendant bears the burden of proving that manifest injustice has occurred...." *Mayer* at 703-04, citing *State v. Turley,* 149 Wn.2d 395, 398, 69 P.3d 338 (2003); *State v. Taylor,* 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

In *Isadore*, the Supreme Court held that when a guilty plea is based on misinformation regarding sentencing consequences, it is involuntary, and thus invalid. *In re Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). The Court further held that "[a]n involuntary plea produces a manifest injustice." *Id.* (citations omitted). Thus, from this language, *Kennar* held that "[f]or a guilty plea to be valid, it must have been entered knowingly,

intelligently, and voluntarily." *Kennar* at 73, citing *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996).

Our Supreme Court defines manifest injustice as '"an injustice that is obvious, directly observable, overt, [and] not obscure.'" *State v. Saas,* 118 Wn.2d 37, 42, 820 P.2d 505 (1991) (quoting *State v. Taylor,* 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). There are four, non-exclusive indicia of a manifest injustice, as follows: "'(1) denial of effective counsel, (2) plea ... not ratified by the defendant or one authorized [by him] to do so, (3) plea was involuntary, (4) plea agreement was not kept by the prosecution.'" *Saas* at 42, quoting *Taylor* at 594; *see also State v. Teshome*, 122 Wn. App. 705, 714, 94 P.3d 1004 (2004).

To distinguish between the inquiry regarding the validity of a guilty plea and the inquiry of whether enforcement of the plea would result in a manifest injustice, Washington courts have cited *State v. McDermond,* 112 Wn. App. 239, 243, 47 P.3d 600 (2002), *overruled on other grounds by State v. Mendoza*, 157 Wn.2d 582, 590-91, 141 P.3d 49 (2006), for the proposition that "[i]f the plea was not valid when entered, the trial court must set it aside regardless of 'manifest injustice.'" *State v. De Rosia*, 124 Wn. App. 138, 149, 100 P.3d 331 (2004); *see also In re Pers. Restraint Petition of Mayer*, 128 Wn. App. 694, 704, 117 P.3d 353,



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357 (2005). However, a recent, unpublished decision places the burden initially on a defendant who seeks to withdraw a guilty plea to first prove a manifest injustice, and then, "[i]f the defendant meets this burden, the State must make 'an affirmative showing that [the] defendant entered [the] guilty plea intelligently and voluntarily.'" *State of Washington v. Joe Socoro Bautista*, No. 70294-7-I, 185 Wn. App. 1054, n.7 (Feb. 17, 2015, unpublished), *review denied,* 183 Wn.2d 1021 (2015), quoting *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996).

Here, the trial court accepted Sandberg's plea of guilty at a pretrial hearing on April 6, 2015. RP 13-20. At the pretrial hearing, Sandberg pled guilty as charged to the crime of assault in the third degree, based on the allegation that she had assaulted a police officer. CP 63, 70, 73. When accepting Sandberg's guilty plea, the trial court addressed Sandberg and asked her: "Do you understand what it is you're pleading guilty to? In other words, what conduct you did that the State alleges constitutes the crime of assault in the third degree?" RP 14. In response, Sandberg answered, "Yes, on accident." *Id.* She then explained, "Not on purpose, on accident I assaulted a …." *Id.* Before Sandberg finished her sentence, the trial court interjected and began to explain the guilty plea process to her. *Id.*



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The trial court made no further inquiry into Sandberg's claim that the assault was an accident. RP 13-20. When concluding the hearing, the trial court addressed Sandberg and read aloud Sandberg's written statement from the plea form, as follows: "On 8/1/14 in Mason County, I assault [sic] a law enforcement officer, Klusman, who was performing official duties." RP 18. In response, Sandberg stated "yes." RP 18. Sandberg's statement did not specifically admit that the assault was intentional, and the trial court did not inquire further into Sandberg's earlier protestation that the assault was an accident. RP 13-20. The information setting forth the charge to which Sandberg was pleading guilty, however, included the element of intent. CP 73. The record shows that Sandberg received a copy of the information at arraignment. CP 83.

Under the provisions of CrR 4.2(d), before accepting a plea of guilty the trial court judge must determine that there is a factual basis for the plea. *See, e.g., State v. Luther*, 31 Wn. App. 589, 591, 643 P.2d 914 (1982). The factual basis supporting the defendant's plea need not come from the defendant's statement but may be from any source relied on by the court, to include a police report or probable cause statement, so long as it is made a part of the record at the time of accepting the plea. *In re Personal Restraint of Fuamaila*, 131 Wn. App. 908, 131 P.3d 318 (2006);



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*State v. Arnold*, 81 Wn. App. 379, 382, 914 P.2d 762 (1996). A "failure to comply fully with CrR 4.2 requires that the defendant's guilty plea be set aside and his [or her] case remanded so that he [or she] may plead anew." *State v. S.M.*, 100 Wn. App. 401, 413, 996 P.2d 1111 (2000), quoting *Wood v. Morris*, 87 Wn.2d 501, 511, 554 P.2d 1032 (1976).

At the time of accepting the guilty plea in the instant case, the trial court had in its possession the probable cause statement filed with the court months earlier, on August 4, 2014, when Sandberg appeared in court for identification following her arrest. CP 74-77. The probable cause statement sets forth facts from which a finder of fact could infer that Sandberg's act of assaulting Officer Klusman was intentional. CP 76-78.

For example, the probable cause statement alleges that Sandberg "stood up and hit one of the people that was sitting in her seats," CP 76, that she resisted arrest, cussed and screamed at patrons of the casino, and that she dug her fingernails into Officer Klusman's arm, drawing blood. *Id.* The totality of this conduct indicates an intentional assault against Officer Klusman. Still more, after the assault, medics evaluated Sandberg and cleared her for booking into the jail, which infers that she was not in medical distress when she committed the assault. CP 76. Then, when Sandberg was booked into the jail, she repeated her assaultive conduct by

attempting to kick an officer and by again digging her fingernails into yet another officer's arm, again breaking the skin. CP 78. These circumstances indicate an intentional assault rather than an involuntary reaction to a purported seizure. But the record of the sentencing hearing does not show that the trial court considered the probable cause statement when finding the factual basis for the plea; nor was the probable cause statement made a part of the record *at the time of the plea.* RP 13-20.

"The court may consider any reliable source of information to determine whether sufficient evidence exists to support the plea, as long as it is made part of the record at the time of the plea." *State v. Arnold*, 81 Wn. App. 379, 382, 914 P.2d 762 (1996), citing *State v. Osborne,* 102 Wn.2d 87, 95, 684 P.2d 683 (1984) (citing *In re Keene,* 95 Wn.2d 203, 210 n. 2, 622 P.2d 360 (1980)). Bearing some similarity to the instant case, one of the issues in *Arnold* was that when pleading guilty to assault, Arnold admitted the act constituting the assault but did not admit that the act was intentional. *State v. Arnold*, 81 Wn. App. 379, 382, 914 P.2d 762 (1996). On appeal of the trial court's denial of Arnold's motion to withdraw his plea, the prosecution conceded error. *Id.* at 382-83. But the Court of Appeals declined to accept the prosecutor's concession, because, even though Arnold's statement of defendant on plea of guilty did not



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admit the element of intent, the element of intent could be inferred from the probable cause statement, and...

> because the record reveal[ed] that the certificate of probable cause was filed of record at the time of the plea hearing, that it was in fact considered by the trial judge at the time of the plea hearing, and that it was made a part of the record of the plea hearing as soon as the judge was made aware that his reliance on the certificate had not earlier been articulated in the record.

*Id.* at 383.

Distinct from *Arnold*, however, the record of the instant case does not reveal any instance, either at the time of the plea or at any other time, where the trial court considered the probable cause statement for a factual basis to support Sandberg's plea of guilty. RP 1-80. At the post-plea hearing on Sandberg's motion to withdraw her guilty plea, the prosecutor argued that "the Court can rely on the affidavit of probable cause for the factual basis." RP 66. But despite the prosecutor's invitation to do so, the trial court did not indicate that it had relied on the probable cause statement as a factual basis for the plea. RP 66-80.

Instead, in regards to the time of the plea as distinct from post-plea hearings, the only contention supported by the record is that the trial court relied exclusively on Sandberg's statement of defendant on plea of guilty for the factual basis to support the guilty plea. RP 18. In this statement, Sandberg admitted that she "assault[ed] a law enforcement officer,


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Klusman, who was performing official duties." RP 18. But at the hearing to accept her guilty plea, Sandberg also protested that the assault was "on accident" and that it was "[n]ot on purpose." RP 14. Generally, a trial court should not accept a guilty plea when the only factual basis for the plea is the defendant's equivocal, inconsistent statements. *State v. Iredale*, 16 Wn. App. 53, 57, 61, 553 P.2d 1112 (1976).

When accepting a plea of guilty, "[t]he judge must determine '"that the conduct which the defendant admits constitutes the offense charged in the indictment or information."'" *State v. S.M.*, 100 Wn. App. 401, 414, 996 P.2d 1111 (2000), quoting *Matter of Keene*, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (quoting *McCarthy v. United States*, 394 U.S. 459, 464, 89 S. Ct. 1166, 1170, 22 L. Ed. 2d 418 (1969)). "Requiring this examination protects a defendant '"who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."'" *Id.*

Here, the plea form that Sandberg signed, and the trial court's colloquy with her at the time of accepting the plea, both show that Sandberg pled guilty knowingly, voluntarily, and intelligently. CP 63-72; RP 13-20. A defendant's signature on a plea statement is strong evidence of voluntariness. *State v. Branch,* 129 Wn.2d 635, 642, 919 P.2d 1228

(1996). When accepting Sandberg's guilty plea, the trial court judge engaged her in an oral colloquy and carefully verified that her guilty plea was her voluntary, knowing, and intelligent choice. RP 13-20. Additionally, the plea form that Sandberg signed informed her that by pleading guilty she was giving up the right to a speedy and public trial by jury, the right to remain silent, the right to refuse to testify against herself, the right to confront witnesses, the right to testify and to compel witnesses to testify for her, the right to the presumption of innocence, and the right to appeal the conviction. CP 63-64. Sandberg's signature and attestations on the plea form, combined with the court's colloquy, give rise to a "well nigh irrefutable" presumption that Sandberg pled guilty knowingly, voluntarily, and intelligently. *State v. Perez,* 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

However, older Washington cases hold that when a defendant couples a guilty plea with a protestation of innocence, the plea is equivocal, and the court should not accept such a plea until the equivocation has been resolved. *See, e.g.*, *State v. Mullin*, 66 Wn.2d 65, 400 P.2d 770 (1965); *State v. Stacy*, 43 Wn.2d 358, 261 P.2d 400 (1953); *State v. Iredale*, 16 Wn. App. 53, 57-58, 553 P.2d 1112 (1976); *State v. Watson*, 1 Wn. App. 43, 459 P.2d 67 (1969). "But not all equivocal pleas

raise this concern." *State v. Hubbard*, 106 Wn. App. 149, 155, 22 P.3d 296, 299 (2001). Generally, the concern with equivocal pleas is that the equivocation might cast doubt upon "whether the defendant understands the proceedings and has made a knowing, voluntary, and intelligent plea." *Id.* at 155, citing *Matter of Montoya*, 109 Wn.2d 270, 280, 744 P.2d 340 (1987). But where there is an independent factual basis for the guilty plea and the defendant pleads guilty in order to take advantage of the State's plea offer, the court may accept the plea notwithstanding the defendant's protestations of innocence. *Id.* at 280-81; *State v. Newton*, 87 Wn.2d 363, 370-71, 552 P.2d 682 (1976); *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164, 27 L. Ed. 2d 162 (U.S. 1970); *but see State v. Iredale*, 16 Wn. App. 53, 553 P.2d 1112 (1976) (declining to apply the *Alford* rule, and finding manifest injustice, where defendants pled guilty despite protestations of innocence and the CrR 4.2 requirement for a factual basis for the plea was not supported by facts made part of the record at the time of the plea).

Here, when Sandberg was entering her plea of guilty in the trial court, the judge asked her whether it was her choice to plead guilty, to which she answered, "Yes." RP 18. Sandberg's counsel then informed the court as follows: "Your Honor, there was holdback charges of bail



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jumping that the State would have filed had the case gone to trial, and that was part of her consideration." RP 19. Apparently, the holdback charge of bail jumping was based on Sandberg's failure to appear at a pretrial hearing. CP 80-82.

The plea form signed by Sandberg stated that she had been informed and fully understood that the elements of the offense of assault in the third degree were "as in the information." CP 63. Sandberg received a copy of the information at arraignment. CP 83. It alleged that Sandberg "did intentionally assault a law enforcement officer or other employee of a law enforcement agency who was performing her official duties at the time of the assault, to-wit: Ofc. Rene Klusman." CP 73. Sandberg signed the plea form, which stated: "I plead guilt to... assault third [degree]... in the original information. I have received a copy of that information." CP 70. When pleading guilty, a defendant has adequate notice of the elements of an offense if the defendant has received a copy of the information charging the offense. *Matter of Montoya*, 109 Wn.2d 270, 280, 744 P.2d 340 (1987); *Matter of Keene*, 95 Wn.2d 203, 208-09, 622 P.2d 360 (1980); *State v. Hews*, 108 Wn.2d 579, 596, 741 P.2d 983 (1987) (noting that controlling "cases stand for the rule that notifying a defendant of the nature of the crime to which he pleads via an information creates, at



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the very least, a presumption that the plea was knowing, voluntary and intelligent").

Still more, "[t]he definition of 'assault' is a willful act[,]" and "the term 'assault' contains within it the concept of knowing conduct." *State v. Hopper*, 118 Wn.2d 151, 158, 822 P.2d 775 (1992). The term "assault" encompasses the element of intent because the term itself, without further elaboration, "adequately conveys the notion of intent." *State v. Davis*, 119 Wn.2d 657, 663, 835 P.2d 1039 (1992); *see also State v. Osborne*, 35 Wn. App. 751, 758-59, 669 P.2d 905 (1983)(reasoning that words of assault inherently describe intentional acts and that notwithstanding a possible claim of accident, no manifest injustice resulted from trial court's failure to inform defendants about the element of intent). Thus, referring to an assault as an intentional assault is redundant. *Id.* Therefore, the State contends that Sandberg's admission that she "assaulted" (CP 70) Officer Klusman is itself sufficient to provide a factual basis for her plea because, by describing her conduct as an "assault," she describes intentional conduct. *Id.*

However, where a defendant's admission of guilt in conjunction with a guilty plea is equivocal, "either because it is coupled with an outright protestation of innocence, or because it is laced about with

excuses or claims in mitigation, [it] may well be an indication the defendant does not fully understand the nature of the charge against him [or her] and that the plea is not truly voluntarily and intelligently made." *State v. Durham*, 16 Wn. App. 648, 652, 559 P.2d 567 (1977). Sandberg avers that the record here does not affirmatively show that her attorney or the court specifically advised her that intent is an element of assault, and that, therefore, her protestation to the trial court that the assault was an accident is proof that she did not understand the nature of the charge or how the facts applied to the charge. Br. of Appellant at 5-10. But, contrary to Sandberg's contention, "'[a]pprising the defendant of the nature of the offense need not "always require a description of every element of the offense."'" *Matter of Keene*, 95 Wn.2d 203, 207, 622 P.2d 360 (1980), quoting *State v. Holsworth*, 93 Wn.2d 148, 153 n.7, 607 P.2d 845 (1980)(quoting *Henderson v. Morgan*, 426 U.S. 637, 647 n.18, 96 S.Ct. 2253, 2258 n.18, 49 L.Ed.2d 108 (1976). Instead, all that is required is that the defendant... be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime." *Id.*

The State contends that the totality of the circumstances of the instant case show that Sandberg was aware of the requisite state of mind, intent, necessary to constitute the crime of assault in the third degree.

Sandberg demonstrated her understanding of the intent element when she protested against it, stating that the assault was an "accident" and "[n]ot on purpose." RP 14. Yet, despite her understanding that intent was an element of assault, she voluntarily chose to plead guilty. RP 13-20; CP 63-72. By protesting that the assault was an accident, Sandberg demonstrated her understanding of the law in relation to the facts, because without this understanding, there was no reason to protest that the assault was an accident. But once Sandberg realized that the judge would not, or could not, accept her plea of guilty if she persisted in claiming the assault was an accident, she dropped the claim and pled guilty as charged, gaining the benefit of the plea bargain agreed to with the State. RP 13-20.

Still more, a denial of intent does not necessarily invalidate a guilty plea. *Matter of Hews*, 108 Wn.2d 579, 596-97, 741 P.2d 983 (1987). Here, similar to the facts in *Hews*, notwithstanding a denial of intent, Sandberg admitted to conduct that constituted the charged offense. CP 70; RP 18. "The denial simply indicated that [defendant] was unwilling to admit culpability despite [her] general willingness to enter a knowing and voluntary plea." *Id.* at 597, citing *North Carolina v. Alford*, 400 U.S. 25, 38, 91 S.Ct. 160, 167, 27 L.Ed. 162 (1970); *State v. Osborne*, 102 Wn.2d 87, 91, 684 P.2d 683 (1984).



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In summary, Sandberg's plea form and the court's colloquy with her show that she knowingly, voluntarily and intelligently pled guilty to the crime of assault in the third degree, as charged. RP 13-20; CP 63-72. Additionally, because the crime of assault inheres the element of intent, Sandberg's admission that she assaulted and officer who was performing official duties was sufficient to provide a factual basis for her plea of guilty. *State v. Hopper*, 118 Wn.2d 151, 158, 822 P.2d 775 (1992). Therefore, the validity of Sandberg's plea is established. *State v. Osborne*, 35 Wn. App. 751, 758-59, 669 P.2d 905 (1983). Finally, because Sandberg has not shown that withdrawal is necessary to prevent a manifest injustice, she has not shown that the trial court abused its discretion by denying her motion to withdraw her guilty plea. *Id.* Accordingly, the trial court should be sustained on this point, and Sandberg's appeal should be denied.

2. Sandberg contends that the court misinformed her of a direct consequence of her guilty plea because the court informed her of both the standard range sentence and the maximum sentence even though, she contends, only the standard range sentence was a real possibility in this case. Sandberg's contention on this point is directly contradicted by controlling precedent of this Court, and the State asks that this Court adhere to its established precedent.



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Sandberg contends that her plea of guilty is invalid because, she avers, she was misinformed of a direct consequence of her plea. Br. of Appellant at 10-13. Sandberg reasons that she was misinformed because, although she was advised of the standard range sentence and was informed of the limited conditions under which the court could impose a sentence outside the standard range (CP 64, 66), she was also advised of the maximum possible punishment for her crime of conviction. Br. of Appellant at 10-13; CP 64. Premised on her contention that the court lacked any basis to impose an exceptional sentence, Sandberg contends that the court misinformed her by informing her of the maximum possible sentence. Br. of Appellant at 10-13.

Sandberg's contention on this point appears to be controlled and contradicted by *State v. Kennar*, 135 Wn. App. 68, 143 P.3d (2006), *reconsideration denied, review denied* 161 Wn.2d 1013, which rejected an argument that was substantially identical to the one Sandberg is making now. *Kennar* noted that CrR 4.2 requires the trial court to inform the defendant of both the standard range sentence and the maximum possible sentence. *Id.* at 75. *Kennar* drew a distinction between a guilty plea hearing and a sentencing hearing, finding that it is at the sentencing hearing, rather than at the guilty plea hearing, that the court actually

determines the offender score and the standard range sentence or whether the court will impose an exceptional sentence. *Id.* at 75-76. Thus, from the information known to the trial court at the time of accepting the plea, the maximum sentence is a relevant possibility. *Id.*

This Court has cited *Kennar* approvingly in a reported decision as recently as July 26, 2016, *State v. Buckman*, 195 Wn. App. 224, 230, 381 P.3d 79 (2016). The State asks this Court adhere to its established precedent and to reject Sandberg's contention on this point.

3. Sandberg contends that the trial court misinformed her of a collateral consequence of her guilty plea because, she avers, she was affirmatively advised that if the court accepted the prosecutor's recommendation of a first-time offender waiver, her felony conviction for assault in the third degree would not appear on her criminal history. The State contends that Sandberg's claim on this point should be rejected because she has not provided any citation to the record to substantiate her claim.

A defendant must be informed of all the direct consequences of his or her guilty plea, but need not be advised of all possible collateral consequences of the plea. *State v. Ward,* 123 Wn.2d 488, 512, 869 P.2d 1062 (1994). A direct consequence is one that has "'a definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *State v. Barton,* 93 Wn.2d 301, 305, 609 P.2d 1353 (1980) (quoting *Cuthrell v. Director,* 475 F.2d 1364, 1366 (4th Cir.), *cert. denied,* 414 U.S.


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1005, 94 S.Ct. 362, 38 L.Ed.2d 241 (1973)). The State contends that the fact that a criminal conviction will appear on one's criminal history has no effect whatsoever "on the range of defendant's punishment," and that therefore, the effect of having a criminal history is, if anything, collateral.

Although a defendant pleading guilty need not be informed of the collateral consequences of a guilty plea, affirmative misinformation about a collateral consequence may permit withdrawal of the guilty plea if the defendant relied on that misinformation when deciding to plead guilty. *State v. Stowe*, 71 Wn. App. 182, 187–89, 858 P.2d 267 (1993).

Here, there are no facts, and no citations to the record, to support Sandberg's assertion that she was affirmatively misinformed that the fact of her conviction would not appear on her criminal history if the court happened to accept the prosecutor's recommendation of a first-time offender waiver.

The attorney who represented Sandberg at her trial court motion to withdraw her guilty plea filed a declaration with the court stating that Sandberg had told him that "[s]he did not understand that this conviction would remain on her record as a first time offender." CP 41. The attorney who represented Sandberg when the trial court accepted her plea of guilty filed a declaration stating that he "would not have necessarily advised Ms.

Sandberg that a conviction would stay on her record whether as a First Time Offender or with a standard range sentence...." CP 79. But nowhere is there a citation to the record that would support an assertion that anyone misinformed Sandberg by affirmatively telling her that her conviction would not appear on her criminal history as a felony conviction if she were sentenced to a first time offender waiver.

The first time offender waiver was discussed at the following pages of the verbatim report: RP 17 (the trial court judge acknowledged the prosecutor's recommendation of first time offender waiver); RP 22 (the prosecutor stated his recommendation for a first-time offender sentence, and Sandberg's attorney stated that Sandberg was eligible for a first-time offender sentence); RP 58 (prosecutor, when arguing against Sandberg's motion to withdraw her guilty plea, states that by pleading guilty Sandberg received the benefit of the prosecutor's recommendation of a first time offender waiver); RP 59 (prosecutor, when arguing against Sandberg's motion to withdraw her guilty plea, argued that at the hearing to accept Sandberg's guilty plea the court engaged in a colloquy with her, informing her that she might not receive the first-time offender waiver); RP 71-72 (prosecutor, at sentencing, recommended a first time offender waiver); and, RP 77-78 (court imposes a first-time offender waiver



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sentence). None of these citations support an assertion that anyone affirmatively misinformed Sandberg in regards to the first-time offender waiver.

## E. CONCLUSION

Despite several peculiarities with Sandberg's guilty plea, the totality of the circumstances show that, by protesting that her assault of Officer Klusman was an accident, Sandberg in effect demonstrated her knowledge that her conduct of digging her fingernails into Officer Klusman's arm, drawing blood, was not an assault unless it was intentional. The totality of the circumstances further show that Sandberg voluntarily, knowingly, and intelligently pled guilty and accepted the benefit of a plea bargain agreed to by the State. Thus, Sandberg's guilty plea is valid, and she has not shown any manifest injustice related to her guilty plea. Accordingly, the trial court did not abuse its discretion when it denied Sandberg's motion to withdraw her plea, and this Court, therefore, should deny Sandberg's appeal on this point.

Sandberg's next contention, that she was misinformed of a direct consequence of her guilty plea because the trial court informed her of the maximum possible punishment as well as the standard range punishment,



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should be rejected because her contention is direct conflict with established precedent of this Court.

Sandberg's final contention – that she was misinformed of a collateral consequence of her guilty plea because, she avers, she was affirmatively misinformed that if she were sentenced to a first time offender waiver her felony conviction would not appear on her criminal history – should be rejected on appeal because her claim that she was affirmatively misinformed is unsupported by the record. Additionally, when accepting her guilty plea, the trial court informed Sandberg that even though the prosecutor was recommending a first time offender sentence, the trial court was not required to follow the prosecutor's recommendation.

In summary, the totality of the circumstances show that Sandberg's guilty plea is valid, and Sandberg has not shown the withdrawal of her guilty plea is necessary to correct a manifest injustice. Accordingly, the trial court did not abuse its discretion when it declined to allow Sandberg to withdraw her guilty plea. Therefore, the State asks that this Court affirm the trial court and deny Sandberg's appeal.



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DATED: December 12, 2016.

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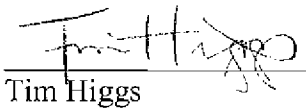

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## December 12, 2016 - 1:58 PM

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